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By

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The Constitution of the United States provides that, "The judicial power shall extend to all cases, in law and equity. . . ."[1] The Congress defined and designated the equity referred to as follows: ". . . the forms and modes of proceeding in suits of equity . . . in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity . . . except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts . . . and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States."[2]

In 1832 Mr. Justice Story in *Boyle v. Zacharie*[3] construed the foregoing "principles, rules, and usages which belong to courts of equity" to mean the principles, rules, and usages of the High Court of Chancery in England, stating that the, ". . . doctrine of this court is, that the remedies in equity are to be administered, not according to the State practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law; subject, of course, to the provisions of the acts of Congress, and to such alterations and rules as in the exercise of the powers delegated by those acts, the courts of the United States may, from time to time, prescribe." The following year this interpretation was reaffirmed by Mr. Chief Justice Marshall in *Vattier v. Hinde*,[4] who declared that, "This act has been generally understood to adopt the principles, rules and usages of the Court of Chancery of England." Six years later this view was upheld by Mr. Justice Wayne in *Story v. Livingston*,[5] who stated that, "Where the rules prescribed by the Supreme Court to the circuit courts do not apply, the practice of the circuit and district courts shall be regulated by the practice of the High Court of Chancery in England." Two years later this construction was restated by Mr. Justice Thompson in *Gaines v. Relf*,[6] who stated that where, ". . . those rules which the Supreme Court of the United States has

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1 Const., U. S., Art. III, sec. 2, clause 1.

2 Act of Sept. 29, 1789, 1 Stat. L. ch. 21, sec. 2, p. 93, R. S. sec. 913; Act of May 8, 1792, 1 Stat. L. ch. 36, sec. 2, p. 276, R. S. sec. 913; Act of May 19, 1828, 4 Stat. L. ch. 68, sec. 1, p. 278, R. S. sec. 992; Act of Aug. 1, 1842, 5 Stat. L. ch. 109, p. 499, R. S. sec. 992.

3 6 Pet. 658, 8 L. Ed. 532.

4 7 Pet. 274, 8 L. Ed. 675.

5 13 Pet. 359, 10 L. Ed. 200.

6 15 Pet. 15, 10 L. Ed. 642.

passed to regulate the practice in the courts of equity of the United States . . . do not apply, the practice of the circuit and district courts must be regulated by the practice of the Court of Chancery in England."

The equity powers of the English Court of Chancery which are to be exercised by the United States courts were said in *Fontain v. Ravenel*[7] in 1854 to be those, ". . . which the High Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States," by Mr. Justice McLean, who three years earlier had declared in *Pennsylvania v. Wheeling and Belmont Birdge Co.*[8] that, "The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings." He termed such usages "the common law of chancery." The objectionability of such a designation may be best summarized by quoting the following passage from the pleading addressed to the Supreme Court of the United States nine years earlier by Mr. Dana, the attorney for the defendant in *Swift v. Tyson*:[9] "In coming together with their respective States, the framers of the Constitution, and our representatives in Congress after them, must be regarded as having had in view the language, laws, and institutions of the States which they represented. If, therefore, in the organization of the federal judiciary, a system of laws is presupposed, it is the American law, which is now as distinct in its character as the English or French."

Louisiana was admitted into the Union in 1812, the only state in which a system of jurisprudence obtained not based upon the common law of England. The law of Louisiana is, in the words of Mr. Justice Bradley in 1879 in *Jackson v. Ludeling*,[10] ". . . based upon the civil law." Yet five years earlier he stated in *The Lottawanna*[11] that, ". . . the common law . . . is the basis of all the state laws." In *Jackson v. Ludeling* he further declared that the civil law of Louisiana is, ". . . not precisely as laid down in the compilations of Justinian, but as interpreted in the jurisprudence of France and Spain. . . . When Louisiana was acquired by the United States in 1803, it had been a colony of Spain for more than thirty years, except in the formal transfer to France at the time of our purchase; and the Spanish law was the common law of the Territory until modified by subsequent legislation. In 1808, the first Civil Code was adopted, based partly on the Spanish Partidas and partly on the project of the Code Napoleon, the completed Code not having yet been received. In 1825, the Civil Code was revised, and was made to conform more closely to the French Code, often copying the phraseology."

In 1830, Mr. Justice McLean in his dissent in *Parsons v. Bedford*[12] stated that, "This system may be called the civil law of Louisiana, and is peculiar to that

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7 17 How. 384, 15 L. Ed. 80.
8 13 How. 563, 14 L. Ed. 249.
9 16 Pet. 1, 10 L. Ed. 865.
10 99 U. S. 513, 25 L. Ed. 460.
11 21 Wall. 558.
12 3 Pet. 444, 7 L. Ed. 732.

State." He explained his nomenclatural designation of the body of jurisprudence of Louisiana thusly: "In the State of Louisiana the principles of the common law are not recognized, neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes. . . . In thus repudiating the forms and principles of the common law, the State of Louisiana has pursued a course different from her sister states. This has resulted from the views of jurisprudence derived by the great mass of her citizens from the foreign governments with which they were recently connected. . . . It is no doubt a wise policy to adapt the principles of government to the moral and social condition of the governed. This is no less true in a judicial than it is in a political point of view; and where an intelligent people possess the sovereign power, they will not fail to secure this first object of a good government."

No courts of chancery exist, or ever have existed, in the state of Louisiana. Neither is chancery jurisdiction possessed by the courts of that state. But the civil law of Louisiana affords in the courts of that state relief substantially equivalent in effect to the remedies extended by courts of chancery in England and in the states of New Jersey, Delaware, Mississippi, Arkansas, Vermont, and Tennessee and offered by the chancery jurisdiction of the courts of the forty-one other states by virtue of the following provision of the Louisiana Civil Code of 1870: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."[18] The phrase "natural law and reason, or received usages" contained in the foregoing provision was construed in 1918 by Mr. Chief Justice Monroe of the Supreme Court of Louisiana in *Osborn v. City of Shreveport*[14] to include, ". . . . the practice in the courts of equity in this country and England." Eleven years later this interpretation was reiterated by Mr. Chief Justice O'Niell of the Supreme Court of Louisiana in *Godfrey v. Ray*[15] to the effect that the phrase "natural law and reason, or received usages" was deemed to include, ". . . the precedents of the courts of equity elsewhere established."

Back in 1830 the fact that the civil law of Louisiana afforded in the courts of that state relief substantially equivalent in effect to the remedies extended by the equity which is the outgrowth of the common law was described by Messrs. Livingston and Webster, the attorneys for the plaintiff in error in *Parsons v. Bedford,* thusly, "In every possible case relief is given by a court of law in Louisiana," and by Mr. Justice McLean in his dissent in the same case as follows, "The modes of proceeding in their (Louisiana's) courts are more nearly assimilated to the forms of chancery than to those of the common law." Five years later in his dissent in *Livingston v. Story*[16] the same jurist stated that by "the peculiar mode of proce-

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18 La. Civ. Code of 1870, Art. 21.
14 143 La. 932, 79 So. 542.
15 169 La. 77, 124 So. 151.
16 9 Pet. 632, 9 L. Ed. 255.

dure under the Louisiana practice . . . an adequate remedy is given." In the same case Messrs. Porter and Clay, the attorneys for the appellee, in their argumentation addressed to the Supreme Court of the United States declared that: "The ordinary courts of Louisiana are armed with the full powers of an equity tribunal. So true is this, that the counsel for the appellant is challenged to show the slightest discrepancy in any important particular; and it is believed that if any one of the court were about to create a court of equity, not by a general reference to another system, but by a special enactment, he would take the Louisiana statute as a model; or, if he did not, his own legal accomplishments would induce him to draw up one in all respects similar." However, Mr. Justice Thompson did not concur in this view for six years later he stated in *Gaines v. Relf* that, ". . . parties to suits in Louisiana have a right to the benefit of these (Federal equity) rules; nor can they be denied by any rule or order, without causing delays, producing unnecessary and oppressive expenses; and in the greater number of cases, an entire denial of equitable rights."

The courts of Louisiana are not, like the chancery courts of England and the aforesaid six American states or the chancery jurisdiction of the courts of the other American jurisdictions, limited either in the kind of relief or in the quantity of relief which may be dispensed, as the civil law of Louisiana is free of the halter of precedent and the reins of tradition characteristic of the equity known to the common law, and is not, like the equity recognized by the common law, solidified and consolidated, but is, rather, elastic and unfettered.

The equity jurisdiction of the United States courts in the several states has repeatedly been held to be uniform, as evidenced by the words of Mr. Chief Justice Marshall in 1819 in *United States v. Howland and Allen,*[17] ". . . the courts of the Union have a chancery jurisdiction in every state, and the Judiciary Act confers the same chancery powers on all and gives the same rule of decision."; by the words of Mr. Justice Story in 1832 in *Boyle v. Zacharie,* "The chancery jurisdiction given by the constitution and laws of the United States is the same in all the states of the Union, and the rule of decision is the same in all."; by the words of Mr. Justice Curtis in 1851 in *Neves v. Scott,*[18] "Wherever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it."; by the words of Mr. Justice Swayne in 1862 in *Noonan v. Lee,*[19] "The equity jurisdiction of the courts of the United States is derived from the Constitution and Laws of the United States. Their powers and rules of decision are the same in all the States."; by the words of Mr. Justice Davis in 1869 in *Payne v. Hook,*[20] "The equity jurisdiction conferred on the Federal Courts . . . is uniform throughout the different States of the Union."; by the words of Mr. Justice Gray in 1885 in *Watts v. Camors*[21],

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17 4 Wheat. 115, 4 L. Ed. 526.
18 13 How. 272, 14 L. Ed. 140.
19 2 Bl. 509.
20 7 Wall. 430.
21 115 U. S. 353.

". . . . the equity . . . jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union."; by the words of Mr. Justice Bradley in 1888 in *Ridings v. Johnson*,[22] ". . . . the equity jurisdiction and remedies conferred by the laws of the United States upon its courts . . . are uniform throughout the different States in the Union."; and by the words of Mr. Justice Sutherland in 1923 in *Mason v. United States*,[23] "That (equity) jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the states."

The fact that the chancery courts of some of those states in which such courts exist have rules of equity differing from the rules of equity promulgated by the Supreme Court of the United States for the government of the equity jurisdiction of the United States courts or differing, in the event of lacunae in the rules of equity formulated by the Supreme Court of the United States, from the rules held by the High Court of Chancery in England, is not significant as such fact can in no way impair the rule of uniformity of the equity jurisdiction of the United States courts in the several States. This proposition was set forth in 1851 by Mr. Justice Curtis in *Russell v. Southard*[24] in the following terms: "It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own views of those principles."; later in the same year by Mr. Justice McLean in *Pennsylvania v. Wheeling and Belmont Bridge Co.* in the following statement, ". . . . the courts of the Union are not limited by the chancery system adopted by any state."; in 1862 by Mr. Justice Swayne in *Noonan v. Lee* as follows: "The equity jurisdiction of the courts of the United States is derived from the Constitution and Laws of the United States. . . . Their practice is regulated . . . by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by state legislation."; in 1869 by Mr. Justice Davis in *Payne v. Hook* as follows: "If legal remedies are sometimes modified to suit the changes in the laws of the States, and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the Federal Courts . . . is subject to neither limitation or restraint by state legislation."; in 1885 by Mr. Justice Gray in *Watts v. Camors* as follows: ". . . . the equity . . . jurisdiction of the courts of the United States, under the national Constitution and laws . . . cannot be limited in its extent, or controlled in its exercise, by the laws of the several States."; in 1886 by Mr. Justice Matthews in *McConihay v. Wright*[25] as follows: ". . . . the jurisdiction in equity of the courts of the United States . . .

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22 128 U. S. 212.
23 260 U. S. 545.
24 12 How. 139, 13 L. Ed. 927.
25 121 U. S. 201.

as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts."; in 1888 by Mr. Justice Bradley in *Ridings v. Johnson* as follows, ". . . . the equity jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation."; in 1892 by Mr. Justice Brewer in *Sheffield Furnace Co. v. Witherow*[26] as follows, ". . . . a state, by prescribing an action at law to enforce even statutory rights, cannot oust a Federal court, sitting in equity, of its jurisdiction to enforce such rights, provided they are of an equitable nature."; and again the following year, at which time the question was designated as "well settled" by Mr. Justice Brewer in *Mississippi Mills v. Cohn,* [27] who stated that: "It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished; though all remedies be administered in a single action at law; and, so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged." However, this question, even though described by Mr. Justice Brewer as "well settled" in *Mississippi Mills v. Cohn,* presented itself to the Supreme Court of the United States again thirty years later in *Mason v. United States,* in which case Mr. Justice Sutherland stated: ". . . . the statutes of a state . . . may not be permitted to enlarge or diminish the Federal equity jurisdiction . . . the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation."

The fact that, even in 1812 when Louisiana became a State, no courts of chancery existed in that State is not in itself important, there being other States in which this condition also obtained, as such fact could in no wise modify the rule of uniformity of the equity jurisdiction of the United States courts in the several States according to Mr. Chief Justice Taney in 1850 in *Bennett v. Butterworth*[28] in the following words: ". . . . as there is no distinction in its (Texas') courts between cases at law and equity, it has been insisted in this case, on behalf of the defendant in error, that this court may regard the plaintiff's petition either as a declaration at law or as a bill in equity. Whatever may be the laws of Texas in this respect, they do not govern the proceedings in the courts of the United States. . . . the State practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. The Constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity." This interpretation, identical even to the particular state

[26] 149 U. S. 574.
[27] 150 U. S. 202, 37 L. Ed. 1052.
[28] 11 How. 674, 13 L. Ed. 859.

involved, was reiterated in 1939, having been expressed in that year by Judge Sibley in *Cities Service Oil Co. v. Dunlap*[29] in the following language: "We have here not a case where a Texas statute has created the right asserted, or has created a presumption, or is in any manner to be applied as construed in Texas. The question is simply what is the proper practice in courts of equity. The practice followed in the State courts of Texas, where equity courts as such do not exist, is not controlling." In 1851 Mr. Justice McLean stated in *Pennsylvania v. Wheeling and Belmont Bridge Co.* that, ". . . the courts of the Union . . . exercise their functions in a state where no court of chancery has been established."

The foregoing construction was severely criticized in 1874 by Mr. Justice Bradley in *Hornbuckle v. Toombs*[30] as follows: ". . . . it is well known that in many states of the Union the two jurisdictions (law and equity) are commingled in one form of action. And there is nothing in the nature of things to prevent such a mode of proceeding. Even in the circuit and district courts of the United States the same court is invested with the two jurisdictions, having a law side and an equity side; and the enforced separation of the two remedies, legal and equitable, in reference to the same subject matter of controversy, sometimes leads to interesting exhibitions of the power of mere form to retard the administration of justice. In most cases it is difficult to see any good reason why an equitable right should not be enforced or an equitable remedy administered in the same proceeding by which the legal rights of the parties are adjudicated." Yet this same interpretation was described as "settled" fourteen years later by the same jurist in *Ridings v. Johnson* in the following terms, "And it is settled law that the courts of the United States do not lose any of their equitable jurisdiction in those States where no such (chancery) courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action."

Yet despite the finality of the foregoing statement by Mr. Justice Bradley, the same question confronted the Supreme Court of the United States four years later in *Scott v. Armstrong*,[31] in which case Mr. Chief Justice Fuller held that, ". . . . legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States." The same question arose as recently as 1939 in *Cities Service Oil Co. v. Dunlap*, in which case Judge Sibley stated that: "The procedure in equity cases has always been governed by a practice uniform over the United States and independent of that in the State courts. This was held proper in federal courts in Louisiana where as in Texas there are no separate courts of equity." Judge Sibley's comparison of Texas to Louisiana in reference to the equity jurisdiction of the United States courts to be exercised in those two States is valid only insofar as neither State possesses courts of chancery. At this point the com-

29 101 F.2d 314.
30 18 Wall. 652.
31 146 U. S. 512.

parison abruptly ends as the courts of Texas afford the equity which is collateral to the common law while the courts of Louisiana do not extend the equity of which the common law is cognizant but do dispense relief substantially equivalent in effect thereto.

In some of those states in which no courts of chancery exist, in the words of Mr. Justice Todd in 1818 in *Robinson v. Campbell,*[82] ". . . . courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce." This fact, however, is of the utmost significance for if the rule of uniformity of the equity jurisdiction of the United States courts in the several states is capable of sustaining an exception thereto, said fact would contribute to the creation of such exception.

Six years subsequent to the admission of Louisiana into the United States, the question, up to that time only theoretical in scope, as to whether the equity which is an appendage to the common law would obtain in the United States courts in the one state in the Union in which both the common law and the equity recognized by the common law were unfamiliar, became of practical importance to Louisiana by virtue of the decision in *Robinson v. Campbell,* but only indirectly since this case did not arise from Louisiana. Mr. Justice Todd held that the fact that in some of those States in which no courts of chancery exist, ". . . . courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce," is not such as to constitute an exception to the aforestated rule of uniformity. The reason assigned by Mr. Justice Todd for this ruling, namely, that "A construction . . . that would adopt the state practice in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction," is valid on its face only insofar as it pertains to some of those states where no courts of chancery exist in which, ". . . all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law." The express reason assigned for the holding, therefore, is overly inclusive as, "A construction . . . that would adopt the state practice in all its extent," is not necessary since a construction that would adopt the State practice in only part of its extent, namely, that part constituted in some of those States in which no courts of chancery obtain by the courts of law therein recognizing and enforcing, ". . . . in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce," would in no wise, ". . . . extinguish, in such states, the exercise of equitable jurisdiction."

Twenty-three years subsequent to the admission of Louisiana into the United States and seventeen years subsequent to the opinion in *Robinson v. Campbell,* the question as to whether the equity which was necessitated by the constriction of the common law would prevail in the United States courts, resident in Louisiana where both the common law and the equity which is an enlargement thereof were un-

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82 3 Wheat. 212, 4 L. Ed. 372.

recognized, became of direct practical significance to Louisiana as a result of the decision in *Livingston v. Story,* a case which arose from the District Court of the United States for the Eastern District of Louisiana and the first case involving this problem originating in Louisiana. This case involved not only one of those States where no courts of chancery obtain in which ". . . . courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce," as a contributing factor to the establishment of an exception to the rule of uniformity of the equity jurisdiction of the United States courts in the several States, but also, for the first time, the gravamen of the proposition for the recognition of such exception, namely, the system of civil law of Louisiana, to which both the common law and the equity extensive of the common law are foreign but which nevertheless affords relief substantially equivalent in results to the remedies which the equity incident to the common law avails. Therefore, if *Livingston v. Story* were to create an exception to such rule of uniformity, the exception would pertain only to the United States courts sitting in Louisiana as the said gravamen is exclusive of that State.

Robinson v. Campbell, decided six years subsequent to the admission of Louisiana into the United States, and *Livingston v. Story,* handed down twenty-three years subsequent to such admission, both constitute cases of first impression insofar as the system of civil law of Louisiana is concerned, differing in their practical application to, and in their consequent effects on, such system, the former consisting of the contributing cause heretofore referred to and influencing certain States directly but bearing on the system of civil law of Louisiana only indirectly, the latter comprising the gravamen previously mentioned as well as the aforesaid contributory cause and affecting such system directly.

Mr. White, the attorney for the appellant in *Livingston v. Story,* addressed the Supreme Court of the United States in his argumentation as follows: "Congress have as much power to declare that any other provision of the Constitution shall be dispensed with, or suspended in any State of this Union, as to enact that the judicial power of the District Court of Louisiana shall not extend to cases in equity: and the equity referred to has been construed by this court to be that system we borrow from the parent country; in other words, that good, old, conscientious, honest system . . . as understood and practiced in England." What semblance of justification had this attorney to refer to England as the parent country in reference to Louisiana? Nevertheless, this same unfounded reference was made fifty-eight years later by Mr. Justice Brewer in *Mississippi Mills v. Cohn* as follows: "The inquiry . . . is, whether by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." Two years later this same unreasonable reference was

made by Mr. Justice Shiras in *Lindsay v. First National Bank of Shreveport*[33] as follows: "The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." The latter two cases arose from the Circuit Court of the United States for the Western District of Louisiana. In the last three cases herein mentioned, all of which originated in Louisiana, the Supreme Court of the United States reversed the United States judges in Louisiana.

Messrs. Porter and Clay, the attorneys for the appellee in *Livingston v. Story*, in their pleadings before the Supreme Court of the United States cautioned that highest of all tribunals in the following manner: "It is understood that the question in this case is, whether the common law, and the equity forms of proceeding, shall be introduced into Louisiana. You cannot introduce the chancery law unless you introduce the common law, and if this is done it will produce great dissatisfaction in that State." This warning is reminiscent of that given to the Supreme Court of the United States five years earlier by Messrs. Livingston and Webster, the attorneys for the plaintiff in error in *Parsons v. Bedford*—the former attorney being the appellee in *Livingston v. Story* five years later, in these words: "To introduce the practice of the common law into any of the courts established in that State (Louisiana), would be against the feelings and wishes of the whole people of the State. . . . The position of anyone who should come from a State where the common law is not known, as from Louisiana, and who should be required to argue a cause on the common law alone, in this court, would be extraordinary. The principle that no relief shall be given in equity where there is a plain remedy at law, would interfere materially with proceedings in the courts of Louisiana. In every possible case relief is given by a court of law in Louisiana; and the distinction between law and equity is not there known. To insist on the establishment of the distinction in the courts of the United States there, would be productive of grievous injury. It would give a foreigner one rule of practice and a citizen another. . . . If the forms of the common law must be pursued . . . the distinction between proceedings at law and in equity, must be established there. This will be productive of great inconvenience, and . . . other injurious effects."

Messrs. Porter and Clay stated that: "It is a singular question whether a system of jurisprudence exists in a State where it is not known or understood. Whether, in a community where the civil law prevails, a system of laws shall be introduced which are against their prejudices. The Constitution was formed at a time when the common law prevailed in all the States which then composed the Union." This observation is reminiscent of that made five years earlier by Mr.

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[33] 156 U. S. 493, 39 L. Ed. 505.

Justice Story in *Parsons v. Bedford* in these words: "At this time (at the time of the adoption of the Constitution) there were no States in the Union the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no States were contemplated in which it would not exist." The last quoted passage apparently reveals that Mr. Justice Story assumed lack of foresight on the part of the framers of the Constitution.

Messrs. Porter and Clay further stated that in the original thirteen States there must, ". . . have been chancery law, for it is a part of the common law; and in reference to this state of things, in all those States there were recognized and established a chancery and a common law jurisdiction, and the principles and rules of courts of common law and courts of chancery. The third section of the third article shows that the Constitution did not introduce those principles, and those modes of proceedings. It found them existing, and provided for their administration. The terms of the Constitution are 'all cases of law and equity arising under the Constitution.' The difference between law and equity, requiring different tribunals for their application to cases, exists in no other country but in England and the United States. Our proposition is that there can exist no equity law but where the common law prevails. In those States they are distinguishable from each other, although part of the same law, and these distinctions are considered a part of the common law; and different courts enforce these different systems. But in Louisiana these distinctions do not exist. To talk of distinguishing law and equity, is as reasonable there as to state that equity and equity differ."

But despite the invincible logic constituting justification for the creation of an exception to the rule of uniformity of the equity jurisdiction of the United States courts in the several States which would apply only to Louisiana and the flawless employment of such logic by Messrs. Porter and Clay, Mr. Justice Thompson in *Livingston v. Story* refused to permit the establishment of such exception, overruling the decision of the judge of the District Court of the United States for the Eastern District of Louisiana and ruling adversely to the contention of Messrs. Porter and Clay, all three of the latter gentlemen being, unlike Mr. Justice Thompson, experts in the system of civil law of Louisiana. It might have been well had the members of the Supreme Court of the United States left this question to be determined exclusively by the United States judges in Louisiana who, for the most part, were educated and trained in the civil law rather than in the common law, the members of the Supreme Court of the United States, with the exception of Mr. Justice White, having been instructed in the common law. The extreme practical importance of this consideration was attested to by the words of wisdom written by Mr. Justice Holmes in his dissent in *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*,[84] "I do not know whether . . . we should regard ourselves as authorities upon the general law of Louisiana superior

[84] 276 U. S. 518, 72 L. Ed. 681.

to those trained in the system." It is unfortunate that Mr. Justice Holmes' admonishment to his fellow members of the Supreme Court of the United States and to that Court as thereafter might be comprised was not proferred until eighty-three years subsequent to the opinion of Mr. Justice Thompson in *Livingston v. Story.* Mr. Justice Thompson summed up his decision in these words: "The sufficiency of the objections, therefore, must turn upon the general question whether the District Court of Louisiana has, by the Constitution and laws of the United States, the same equity powers as a circuit court of the United States has in the other States of the Union; and we think it has . . . such equity powers must be exercised according to the principles, rules and usages of the circuit courts of the United States, as regulated and prescribed for the circuit courts in the other States of the Union." It is interesting to note that both Mr. Justice Thompson and Mr. Edward Livingston, the appellee in *Livingston v. Story,* were born in New York, were educated in New Jersey, and became legal scholars of recognized eminence, the comparison capable of being extended no further as the former attained standing as one of the most prominent authorities on the common law while the latter rose to the rank of the most illustrious proponent of the system of civil law of Louisiana.

The problem posed by, and ostensibly settled by, *Livingston v. Story* presented itself again three years later in *Poultney v. City of Lafayette,*[35] Mr. Chief Justice Taney upholding the view of Mr. Justice Thompson and reversing the judge of the Circuit Court of the United States for the Eastern District of Louisiana. The same problem confronted the Supreme Court of the United States twice the following year, first in *Story v. Livingston,* decided by Mr. Justice Wayne, and then in Ex parte *Myra Clarke Whitney,*[36] decided by Mr. Justice Story. Mr. Justice Thompson's view was reiterated by both of these jurists, the latter overruling the judge of the Circuit Court of the United States for the Eastern District of Louisiana and the former stating that: ". . . those rules which the Supreme Court of the United States has passed to regulate the practice in the courts of equity of the United States . . . are as obligatory upon the courts of the United States in Louisiana as they are upon all other United States courts. . . . The parties to suits in Louisiana have a right to the benefit of them; nor can they be denied by any rule or order, without causing delays, producing unnecessary and oppressive expenses, and in the greater number of instances, an entire denial of equitable rights." The last sentence is in diametric conflict with the following passage in Mr. Justice McLean's dissent in *Livingston v. Story*: "The peculiar mode of procedure under the Louisiana practice preserves, substantially, the same forms in affording a remedy in all cases . . . by this mode of proceeding an adequate remedy is given."

Two years later the identical problem arose for a fifth time in *Gaines v. Relf,* a case which reached the Supreme Court of the United States on certificate from the Circuit Court of the United States for the Eastern District of Louisiana. The

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[35] 12 Pet. 474, 9 L. Ed. 1161.
[36] 13 Pet. 403, 10 L. Ed. 221.

organ of the Court was again Mr. Justice Thompson who, as might be expected, reaffirmed the view he had expressed six years earlier in *Livingston v. Story* and which had been shared by Mr. Chief Justice Taney three years earlier in *Poultney v. City of Lafayette* and by Mr. Justice Wayne and Mr. Justice Story two years earlier in *Story v. Livingston and* Ex parte *Myra Clarke Whitney* respectively. Mr. Justice Thompson stated in *Gaines v. Relf* that: ". . . those rules which the Supreme Court of the United States has passed to regulate the practice in the courts of equity of the United States . . . are as obligatory upon the courts of the United States in Louisiana, as upon all other United States courts. . . . The various cases which had been before the court, involving substantially the same question, in relation to the States where there were no equity State courts . . . were referred to; and the uniform decisions of this court have been that there being no equity State courts did not prevent the exercise of equity jurisdiction in the courts of the United States. And it was accordingly decided that the District Court of Louisiana was bound to proceed in equity causes according to the principles, rules, and usages, which belong to courts of equity, as contradistinguished from courts of common law."

Thus, in both *Livingston v. Story* in 1835 and in *Gaines v. Relf* six years later, Mr. Justice Thompson made no distinction whatsoever between the United States in which no courts of chancery exist on the one hand and Louisiana and certain other States in which no courts of chancery exist but in which, ". . . courts of law recognize and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognize and enforce," on the other hand. In fact, Mr. Justice Thompson did not even distinguish between the States in which no courts of chancery exist to dispense the equity which is a projection of the common law but in which such courts ofchancery could exist on the one hand and Louisana, where no courts of chancery obtain, but where such courts of chancery could not obtain inasmuch as the civil law prevails in that State, and the equity which is collateral to the common law is unfamiliar to the civil law. Yet in the face of such irrefutable conditions and unimpeachable facts, Mr. Justice Thompson in *Gaines v. Relf* termed the cases arising from the United States courts in those States in which no courts of chancery exist, even including among such States those States in which, ". . . all relief is denied, and such equitable claims and rights are to be considered as mere nullities at law," and the cases arising from the United States courts in Louisiana as, ". . . involving substantially the same question."

If Mr. Justice Thompson had decided the issue embodied in *Livingston v. Story* in 1835 correctly, in all probability that same issue would not have confronted the Supreme Court of the United States subsequently as it did. The following excerpt from the opinion in *Gaines v. Relf* sounds indicative of apprehension on the part of Mr. Justice Thompson, to whom had fallen the unique task of determining the problem twice, lest the question present itself again to the Supreme Court of the United States even after *Gaines v. Relf*. "These questions having been so

repeatedly decided by this court, and the grounds upon which they rest so fully stated and published in the reports, that it is unnecessary, if not unfit, now to treat this as an open question." Thus, the question was officially designated as closed in 1841 in *Gaines v. Relf* by the Supreme Court of the United States speaking through Mr. Justice Thompson.

However, even though the question was formally described as no longer an open one in 1841 by Mr. Justice Thompson in *Gaines v. Relf,* nevertheless ten years later the precise question plagued the Supreme Court of the United States for the sixth time in *Bein v. Heath,*[37] in which case Mr. Chief Justice Taney for the second time upheld the view twice announced by Mr. Justice Thompson—he having done so thirteen years previously in *Poultney v. City of Lafayette,* reversed the judge of the Circuit Court of the United States for the Eastern District of Louisiana, and stated that: "And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grants it or not, according to the established principles of equity, and not according to the laws and practice of the State in which there is no court of chancery, as contradistinguished from a court of common law."

Later in the same year, in *Neves v. Scott,* a case involving a similar problem but not originating in Louisiana, Mr. Justice Curtis ruled that the principles of equity, ". . . may make part of the law of a state, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence." The last phrase obviously referred to Louisiana by implication as that state is the only jurisdiction in the United States where the principles of the equity which is an elongation of the common law are unknown. Mr. Justice Curtis further stated that: "Instances of each kind may be found in the several states. But in all the states, the equity law, recognized by the Constitution and by Acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court."

Thirty-two years later the exact question arose for determination by the Supreme Court of the United States for the seventh time in *Ellis v. Davis,*[38] in which case Mr. Justice Matthews upheld the view twice expressed by both Mr. Justice Thompson and Mr. Chief Justice Taney and declared that, "It has been often decided by this court that the terms 'law' and 'equity,' as used in the Constitution are . . . intended to mark and fix the distinction between the two systems of jurisprudence as known and practiced at the time of its adoption." But how could a distinction fixed in 1789, when the Constitution of the United States went into effect and thereby affected only eleven states, have applied to Louisiana, which jurisdiction did not become a state until twenty-three years later? This sophistry is reminiscent of the opinion twenty-nine years earlier in *Fontain v.*

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[37] 12 How. 178, 13 L. Ed. 939.
[38] 109 U. S. 497.

Ravenel, in which case Mr. Justice McLean held the equity powers of the English Court of Chancery to be exercised by the United States courts to be those, ". . . which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States." This illogical proposition was advanced ten years after *Ellis v. Davis* by Mr. Justice Brewer in *Mississippi Mills v. Cohn* thusly, ". . . the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the Constitution of the United States."

Two years after *Ellis v. Davis* the same question presented itself for adjudication by the Supreme Court of the United States for the eighth time in *Watts v. Camors,* a case which arose from the Circuit Court of the United States for the Eastern District of Louisiana in which Mr. Justice Gray reiterated the view twice presented by Mr. Justice Thompson and Mr. Chief Justice Taney, stating that, ". . . the equity . . . jurisdiction of the courts of the United States, under the national Constitution and laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States."

Three years later, in 1888, the foregoing question confronted the Supreme Court of the United States for the ninth time in *Ridings v. Johnson,* in which case Mr. Justice Bradley followed what had become by that time a series of precedents by overruling the judge of the Circuit Court of the United States for the Eastern District of Louisiana and stating that: "The fact that an action of nullity lies in such a case in Louisiana does not vary the matter. Such an action lies there because there are no courts of equity in that State; all suits are actions at law; but, in the nature of things, if full justice is to be done, some of these actions must admit of lines of inquiry, and methods of relief which, under the English system, would be proper for a suit in equity. And it is settled law that the courts of the United States do not lose any of their equitable jurisdiction in those States where no such courts exist; but, on the contrary, are bound to administer equitable remedies in cases to which they are applicable, and which are not adapted to a common law action." Thus, a question was officially designated as "settled" in 1888 by Mr. Justice Bradley in *Ridings v. Johnson* which had been described by Mr. Justice Thompson with equal formality as one, ". . . unnecessary, if not unfit, now to treat . . . as an open question," forty-seven years earlier in *Gaines v. Relf* and which had arisen from the Circuit Court of the United States for the Eastern District of Louisiana for adjudication by the Supreme Court of the United States three times during the interim. Mr. Justice Bradley further stated in *Ridings v. Johnson* that: "Thus, an equitable title or an equitable defense, though allowed to be set up in a state court, cannot be set up in an action at law in the same State in the federal courts, but must be made the subject of a suit in equity. . . . We have distinctly held that the equity jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the different States of the Union."

Five years after *Ridings v. Johnson* the familiar question arose for the tenth time, despite Mr. Justice Bradley's designation of the question as "settled" five years earlier. Mr. Justice Brewer in *Mississippi Mills v. Cohn* reaffirmed what might be termed "the Thompson-Taney view," reversed the judge of the Circuit Court of the United States for the Western District of Louisiana—the sixth time the Supreme Court of the United States overruled a United States court in Louisiana on this question, and declared that: "It is well settled that the jurisdiction of the Federal courts, sitting as courts of equity, is neither enlarged nor diminished by state legislation. Though by it all differences in forms of action be abolished; though all remedies be administered in a single action at law; and so far at least as form is concerned, all distinction between equity and law be ended, yet the jurisdiction of the Federal court, sitting as a court of equity, remains unchanged." Thus what had been described as "settled" in 1888 by Mr. Justice Bradley in *Ridings v. Johnson* was promoted to the designation of "well settled" by Mr. Justice Brewer in *Mississippi Mills v. Cohn* five years later.

Although variously described as one, ". . . unnecessary, if not unfit, now to treat . . . as an open question," in 1841, as "settled" in 1888, and as "well settled" in 1893, nevertheless thirty years after *Mississippi Mills v. Cohn* the question reached the Supreme Court of the United States for the eleventh time in *Mason v. United States,* a case which arose from the District Court of the United States for the Western District of Louisiana in which Mr. Justice Sutherland expounded the Thompson-Taney view by declaring that state: ". . . statutes may not be permitted to enlarge or diminish the Federal equity jurisdiction. . . . That jurisdiction is conferred by the Constitution and laws of the United States and must be the same in all the states . . . the power of the courts of the United States to entertain suits in equity and to decide them cannot be abridged by state legislation."

The fact that the Supreme Court of the United States was requested to determine, and did determine, the question on ten separate subsequent occasions which it had presumably determined in *Livingston v. Story* would seem to indicate a prevalence of the belief on the part of the citizens of the State of Louisiana that Mr. Justice Thompson's and Mr. Chief Justice Taney's view was unsound. The determined course of resistance met by the Thompson-Taney view over a period of eighty-eight years, from *Livingston v. Story* to *Mason v. United States,* vouchsafes to the correctness of the following prediction made by Messrs. Porter and Clay in *Livingston v. Story* should the Supreme Court of the United States adjudicate as it did: "It is understood that the question in this case is, whether the common law, and the equity forms of proceeding, shall be introduced into Louisiana. You cannot introduce the chancery law unless you introduce the common law, and if this is done it will produce great dissatisfaction in that State."